Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16738/2018**

THE IMMIGRATION ACTS

Heard at Field House in London
On 3 June 2019

Decision & Reasons Promulgated
On 17 June 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MAKSUDUR RAHMAN

(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Elahi (Solicitor)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 14 March 2019 following a hearing of 6 March 2019. The tribunal dismissed the claimant's appeal against a decision of the Secretary of State, of 28 July 2018, refusing him grant to him indefinite leave to remain on human rights grounds.

2. The claimant is a national of Bangladesh and he was on born 16 June 1986. He obtained entry clearance abroad and entered the UK on 13 January 2008 having been given leave to do so as a student. He subsequently obtained further periods of limited leave. On 27 February 2017 one day prior to his limited leave expiring, he applied for leave to remain on the grounds of family and private life (though he does not have family members in the UK) under Article 8 of European Convention on Human Rights (ECHR). However, prior to that application being decided, he made a further application on 26 May 2017. That application, in fact, operated to vary the previous and as yet undecided application. Then, on 31 October 2017, the Secretary of State refused that application. The claimant sought to challenge that refusal by way of judicial review but such was unsuccessful. On 13 November 2017 he made a fresh application for leave to remain outside the immigration rules. On 5 January 2018, prior to that application being decided, he varied the terms of that application so that it included a contention that he was entitled to indefinite leave to remain on the basis of ten years lawful residence in the UK. It was that application which was refused on 28 July 2018 and which has led to the appeal to the tribunal and now to this appeal to the Upper Tribunal.

3. It was argued before the tribunal that although it might appear that the claimant had fallen short of ten years lawful residence that was not so because of the effect of and interaction between paragraph 276A and 276B of the Immigration Rules, paragraph 39E of those Rules, and policy considerations. The case put to the tribunal on behalf of the claimant was summarised by it in its written reasons (it is not suggested inaccurately) in this way:

> "16. In relation to the question of whether or not the appellant has accrued 10 years lawful residence in the United Kingdom. Miss Rahman relied on her skeleton argument. In essence she submitted that where it is appropriate to exercise discretion under paragraph 39E of the Immigration Rules, this has the effect of disregarding any period of overstaying between when the application is lodged, and a decision is made. In other words, had the respondent exercised discretion in respect of the period of overstaying from 31 October 2017 until 13 November 2017 when the appellant submitted his application for further leave, he ought also to have to disregarded the further overstaying up until the point at which he made a decision on the application effectively treating that as lawful residence.
>
> 17. I suggested that the application of paragraph 39E simply meant the period of overstaying between 31 October 2017 and 13 November 2017 should be disregarded, but that the appellant must nevertheless still demonstrate ten years continuous lawful residence. Miss Rahman relied paragraph 276B(v) of the rules which states that 'where paragraph 39E of these rules apply, any current period of overstaying will be disregarded' for her submission that the appellant did not need to do so. She also relied on the respondent's guidance on long residence applications. Miss Rahman submitted I ought to find the appellant satisfied paragraph 276B of the Rules.
>
> 18. In the alternative, she submitted the appellant would face very significant obstacles to his integration in Bangladesh and that he satisfied paragraph 276ADE of the Rules. Although she acknowledged

the appellant has family members in Bangladesh, she submitted the issue is whether or not he has sufficient ties there in order to be able to re-establish life and noted his evidence that his uncle would not assist him. She referred to the appellant's evidence about the difficulty he believed he would have in finding employment on return.

19. In relation to the question of proportionality pursuant to article 8 of the ECHR outside the Rules, Miss Rahman submitted the appellant speaks English and is financially independent. She relied on the detailed submissions and caselaw set out in her skeleton argument and invited me to allow the appeal."

4. The Tribunal then analysed matters and reached findings as follows:

"**The law and burden and standard of proof**

20. Paragraph 276A defines some relevant terms for the purposes of paragraph 276B which governs applications made on the grounds of long residence in the United Kingdom. It is for the appellant to show on the balance of probabilities he satisfies any relevant provisions of the Immigration Rules.

21. 'Lawful residence' means residence which is continuous residence pursuant to:

'(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including when an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.'

22. Paragraph 276B provides where relevant:

'**276B.** The requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the United Kingdom are that:

(i) (a) he had at least 10 years continuous lawful residence in the United Kingdom.

...

(v) the applicant must not be in the UK in breach of immigration laws, except that where paragraph 39E of these Rules applies; any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where-

(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on after 26 November 2016 and paragraph 39E of these Rules applied.'

23. Paragraph 39E of the Rules provides where relevant:

'**39E.** This paragraph applies where:

…

(2) the application was made:

(a) following the refusal of a previous application for leave which was made in-time applied and;

(b) within 14 days of:

(i) the refusal of a previous application for leave or

(ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or

(iii) the expiry of the time limit for making an in-time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn, or abandoned, or lapsing.'

24. The respondent's guidance on Long Residence date 3 April 2017 which in force at the date of decision provides where relevant:

'**Breaks in lawful residence**

This page tells you about circumstances that break lawful residence for long residence applications and when you can use discretion for short breaks in lawful residence.

Gaps in lawful residence

You may grant the application if an applicant:

- has short gaps in lawful residence through making previous applications out of time by no more than28 calendar days where those gaps end before 24 November 2016.
- has short gaps in lawful residence on or after 24 November 2016 but leave was granted in accordance with paragraph 29E of the immigration rules.
- meets all the other requirements for lawful residence.

Applications made on or after 24 November 2016

Where an out of time application is submitted on after 24 November 2016, you must consider whether to exercise discretion in line with paragraph 39E of the immigration rules. This must be authorised by a senior caseworker at executive officer (SEO) grade.'

25. In so far as he relies on article 8 outside the Rules it is for the appellant to show that article 8(1) of the ECHR is engaged and if so it is for the respondent to show that the decision was in accordance with the law, made in pursuance of a legitimate aim and that it was proportionate to the legitimate aim. The standard of proof is the balance of probabilities. Section 117A to 117D of the 2002 Act are relevant to any assessment under article 8 of the ECHR outside the Rules.

Finding and reasons

26. The appellant sought leave to remain on the basis the he had accrued ten years' lawful residence pursuant to paragraph 276B of the Immigration Rules. The appeal turns on two of the requirements under paragraph 276B; the requirement to demonstrate at least ten years continuous lawful residence; and the requirement that the applicant not to be in the United Kingdom in breach of immigration laws.

27. The two requirements are distinct, and each must be satisfied in order for an applicant to succeed.

28. The appellant made two applications that are relevant to this appeal. The first was made on 27 February 2017 and the second was made on 13 November 2017. Both applications were subsequently varied while they were outstanding. It is not in dispute that either of these variations was valid.

29. The appellant's application for leave to remain made on 27 February 2017 and varied on 26 May 2017 was refused on 31 October 2017 with an out of country right of appeal. He challenged that decision by way of an application for judicial review, however permission was refused on 21 June 2018. It is not disputed that the appellant had continuing leave to remain pursuant to section 3C of the Immigration Act 1971 until 31 October 2017. The application for judicial review did not operate to extend the appellant's leave to remain beyond 31 October 2017 pursuant to section 3C.

30. The appellant's immigration history shows that he had always had valid leave to remain and that all his applications for further leave to remain were made in-time prior to 31 October 2017. I find on this basis that the appellant's residence in the United Kingdom from his date of entry on 13 January 2008 until the decision on his application on 31 October 2017 was lawful. The appellant entered the United Kingdom on 13 January 2008 and therefore as at 31 October 2017, had accrued nine years and nine and a half months lawful residence.

31. The question is therefore whether or not the appellant's residence after 31 October 2017 counts towards the requirements to accrue ten years continuous lawful residence under paragraph 276B(i)(a) of the Immigration Rules. The appellant's position is that it does, relying on paragraph 276B(v) and 39E of the Rules. The respondent's position is that it does not.

32. "Lawful residence" is defined as set out above. It is not disputed that the appellant has not had leave to enter or remain in the United Kingdom at any point after 31 October 2017 and I find that he has not. It was not suggested that he had been granted temporary admission or immigration bail at any point after 31 October 2017 and I find that he was not. There was no evidence to suggest that he was exempt from immigration control after 31 October 2017 and I finds that he was not. For these reasons I find the appellant's residence after 31 October 2017 was not lawful residence as defined in paragraph 276A of the Rules. Accordingly, I find that the appellant dos not satisfy paragraph 276B(i)(a) of the Rules because as at the date of the decision he had not accrued ten years continuous lawful residence.

33. Miss Rahman's submission is that the combined effect of paragraph 276B(v) and paragraph 39E of the Rules is to override the need for the appellant to show (on his facts) ten years continuous

lawful residence because the last period of residence during which he has been an overstayer is disregarded.

34. The respondent 's guidance set out above provides that when as in the case of the appellant, an out of time application is submitted after 24 November 2016, he must consider whether or not to exercise discretion under paragraph 39E of the Rules. There is no evidence the respondent considered exercising discretion in this case. It is not referred to in the refusal letter and the respondent simply asserts that the appellant has not accrued ten years continuous lawful residence. If he did consider exercising discretion and decide not to, the respondent has failed to provide reasons from that decision.

35. The appellant's application made on 13 November 2017 was made following the refusal of a previous in-time application that had been refused. The application was made within 14 days of refusal of the previous application for leave and within 14 days of the expiry of leave extended by section 3C of the 1971 Act. I find that paragraph 39E (2) is satisfied.

36. Paragraph 39E applies to the appellant's application made on 13 November 2017. This is relevant to paragraph 276B(v) which states "where the paragraph 39E of these Rules applies, any current period of overstaying will be disregarded". Miss Rahman submitted that this means the period of overstaying after 31 October 2017 until such time as the respondent made a decision on the appellant's application should be disregarded. It follows in Miss Rahman's submission that although the appellant's residence after 31 October 2017 was not lawful within the meaning of paragraph 276A of the Rules, it should be treated as if it were.

37. The purpose of paragraph 39E is to set out circumstances where an applicant is exempt from the requirement not to be an overstayer and where short periods of overstaying (i.e. between applications) can be disregarded. Neither paragraph 39E nor paragraph 276B(v) provides that where they apply, the appellant need not satisfy paragraph 276B(i)(a). In the appellant's situation, paragraph 276B(v) and paragraph 39E operate to mean that he is exempt from the requirement not to be an overstayer between 31 October2017 and 13 November 2017 when he made his application but does not go any further.

38. The respondent's guidance relied upon by Miss Rahman does not assist the appellant in my view, as it appears to contemplate any gaps in lawful residence in previous applications. None of the examples of gaps in lawful residence are on all fours with the appellant's situation. The appellant's only gap in lawful residence is after his last period of leave extended by section 3C of the 1971 Act came to an end. Similarly, the example given in relation to out of time applications is not on all fours with appellants situation. The example given is where there is a period of overstaying after the end of leave to remain, and prior to the submission of an application for further leave to remain, where that application is successful. In the example, the applicant has a period of lawful residence after the period of overstaying. The period of overstaying in the example is considered when the applicant later applies for indefinite leave to remain on the grounds of long residence and is disregarded. Nothing in the guidance suggests that an applicant

> in the appellant's position need not satisfy paragraph 276B(a)(i) or alternatively that they are deemed to satisfy it.
>
> 39. I find that the appellant does not satisfy paragraph 276B(i)(a) of the Rules and accordingly the respondent was correct to refuse the application for indefinite leave to remain."

5. Having dealt with all of that the tribunal then went on to explain, in some detail, why it thought the claimant could not benefit from paragraph 276(ADE)(1)(vi) of the Immigration Rules nor article 8 of ECHR outside the Rules. I have not found it necessary to set out all it had to say about those aspects of its decision on the appeal.

6. Permission to appeal was sought. It was granted on the basis that the tribunal might have erred in its consideration of the ten-year lawful residence rule requirement and with respect to the quality of its reasoning concerning the possible application of article 8 of the ECHR. Permission having been granted, there was a hearing before the Upper Tribunal (before me) so that consideration could be given as to whether or not the tribunal had erred in law, and if so, what should flow from that. Representation was as indicated above and I am grateful to each representative.

7. Mr Elahi (who had not drafted the grounds of appeal to the Upper Tribunal) argued, that the tribunal had erred in misconstruing paragraph 276B of the Immigration Rules. Further, there might, he suggested, be other ways in which residence might be lawful in addition to those three ways specified at paragraph 276A. He accepted though, I think realistically, that in suggesting the tribunal had erred in relation to the lawful residence issue, he did not have an easy task. He also argued the points made in the written grounds with respect to article 8 of the ECHR. Mr Kotas relied upon a "Rule 24 reply" of 31 May 2019 and argued that there is a substantive requirement that a claimant clock up ten years lawful residence and that, quite simply, it was obvious the claimant had not done that. The tribunal's analysis as to that had been correct. Further, he relied upon his trenchant criticism in the Rule 24 reply, of a suggestion in the written grounds that the ten-year period should run from the grant of entry clearance rather than from the date of actual entry into the UK.

8. It seems to me quite clear that the tribunal with respect to the question of ten-years lawful residence, got it right. It is not always wholly easy to follow the written grounds but the tribunal's analysis is a model of clarity and logic. I cannot find fault with that analysis at all. Indeed, it does appear that the author of the written grounds has lost sight of the fact that there is a basic and straightforward ten-year lawful residence requirement. On the facts of this case, as found, the claimant does not meet that requirement. I agree with the tribunal's conclusion at paragraph 37 of its written reasons that the provisions in paragraph 39E of Rules do not serve to effectively convert a period of overstaying into a period of lawful residence for the purposes of paragraph 276B(i)(a). As to the argument, not pursued before me by Mr Elahi, that the period of lawful residence begins with a grant of entry clearance abroad rather than upon actual entry, that does not appear to make obvious sense when

viewed from the perspective that time spent living in another country, even with a grant of entry clearance, is not time spent living or residing in the UK.

9. As to article 8 within the Rules and outside them, the tribunal's assessment was careful and holistic. Despite a criticism in the written grounds, the tribunal was perfectly entitled to have regard to what had been said in *SSHD v Kamara* [2016] EWCA Civ 813 when considering the meaning of the word "integration". It mattered not, for those purposes, that *Kamara* was a deportation case. Nor is it right to say, as is suggested in the grounds, that the tribunal had limited itself, when considering article 8 outside the rules, to an evaluation of the matters specified in section 117B of the Nationality, Immigration and Asylum Act 2002. It certainly did consider those matters but what it had to say at paragraph 54 of its written reasons, encompassing the significance of the claimant's length of residence in the UK, his studies and employment in the UK, his friendships despite the lack of any evidence from any such friends, and the lack of any evidence of community ties, demonstrated it was undertaking a holistic assessment. The suggestion that the tribunal did not consider stage 4 of the "Razgar" process is simply wrong. It did so at paragraph 51 of its written reasons and it was permissibly brief because it had not been disputed before it that any interference there was with the right to respect for private life was anything other than in pursuance of a legitimate aim. There is a suggestion in the grounds that the tribunal erred through setting too high a threshold with respect to the question of proportionality at stage 5 of the Razgar process. That was, I think, the only point Mr Elahi himself saw fit to pursue before me regarding article 8. But, in any event, the tribunal found the decision to be proportionate, essentially, for the sound and cogent reasons it gave at paragraph 54 of its written reasons. Even if it was wrong to ask itself whether the Secretary of State's decision did "create unjustifiably harsh consequences" for the claimant, no other outcome could have rationally been reached.

10. I have concluded in light of the above that the tribunal did not err in law. Indeed, in my judgment it conducted a full and thorough assessment as to all of the issues raised by the appeal. Its conclusions are legally sound and shall stand.

Decision:

The decision of the First-tier Tribunal did not involve in making of err of law. The claimant's appeal to the Upper Tribunal is, therefore, dismissed.

No anonymity direction was sought before me. I make no such direction.

Signed

MR Hemingway

Judge of the Upper Tribunal
Dated: 12 June 2019